

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Applicant: Wayne L. Knigge et al.

Title: VACUUM-SEALED PACKAGE CONTAINING FRANGIBLE MATERIALS (AS AMENDED)

Docket No.: 869.021US1
Filed: August 31, 2001
Examiner: Robert Madsen

Serial No.: 09/945,318
Due Date: January 21, 2007
Group Art Unit: 3721

MS Appeal Brief - Patents

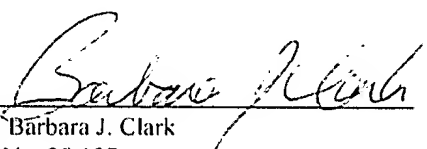
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REPLY BRIEF UNDER 37 C.F.R. 41.41

MS APPEAL BRIEF - PATENTS

Commissioner for Patents

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This Reply Brief is presented in response to the Examiner's (Supplemental) Answer (hereinafter "Answer"), dated November 21, 2006, which was sent in answer to Appellant's Second Substitute Appeal Brief, which was presented as a Reply Brief to maintain the appeal under 37 C.F.R. §§ 41.39(b)(2) and 41.41 in reply to the Examiner's Answer mailed May 12, 2006 and further in response to the Notification of Non-Compliant Appeal Brief mailed on August 3, 2006. As stated therein, the Second Substitute Appeal Brief was presented not only as a Reply Brief but as a replacement of the Appeal Brief received by the United States Patent and Trademark Office on December 19, 2005 and also as a replacement of the Substitute Appeal Brief received by the United States Patent and Trademark Office on July 11, 2006.

Argument

Appellant has reviewed the Answer (which appears to be identical to the Answer mailed on May 12, 2006) and maintains that the Answer has failed to establish a *prima facie* case of obviousness of claims 1, 4-17, 21, 22, 24, 27-29, 32-35, 37-39, 41-43, 45-57, 59-65 and 77-79 that also had not been established in the Final Office Action mailed on May 19, 2005. The Appellant believes the statements in the Second Substitute Appeal Brief remain accurate and compelling. Therefore, any lack of reference in this Reply Brief to a particular argument in the pending Second Substitute Appeal Brief is not to be construed as an admission that the Appellant agrees with any of the statements in the Answer. Appellant asks that the statements made in Appellant's pending Second Substitute Appeal Brief be considered in full, in addition to the statements included with this Reply Brief.

In responding to the Answer, the Appellant will highlight statements made by the Office in the Response to Arguments section (8) and Appellant's response to those arguments starting on page 25 of the Second Substitute Appeal Brief. The Appellant will further discuss the holding of *In re Kahn*¹ which was decided recently by the Federal Circuit. The Appellant respectfully submits that, even under the obviousness standard applied in *In re Kahn*, the Final Office Action and the Answer fail to establish a *prima facie* case of obviousness.

1) Responding to (8) Response to Arguments regarding Packaging Technology supporting the assertion of a surprising result

Appellant again asserts that Packaging Technology supports the assertion of a surprising result. Appellant notes that the Answer now admits that Packaging Technology does discuss "fragile" items, although again improperly states that Packaging Technology discusses "soft" items, when, in fact, Packaging Technology refers to "too soft" items. (See page 29, col. 2, lines 10-12 of Packaging Technology and page 14 in the Second Substitute Appeal Brief). Therefore, the comments in the Answer regarding the "soft items" of cigars and French fries are not relevant, as these would not be considered by those skilled in the art to be items which are "too soft" as to be crushed under the effect of a vacuum in a flexible package.

Appellant further wishes to call attention to the Board of the inconsistency in the Answer of the method used to interpret the teachings of the Beer reference as compared to the method used to interpret the teachings of the Packaging Technology reference. The Answer states on page 24 that Packaging Technology does not teach or suggest that a "fragile item" includes puffed cereal compositions, while assuming repeatedly throughout prosecution, including in other portions of the Answer, including on page 23, that the ready to eat cereal in Beer is not limited to any particular type of breakfast cereal, such as non-frangible cereals. In one instance, the Answer is simply ignoring the fact that a fragile item can and certainly does include a frangible puffed cereal piece (Packaging Technology). In sharp contrast, the Answer is reading an interpretation into a reference that goes well beyond the teachings of the reference (Beer). Attempting to show obviousness in this manner is wholly impermissible. Additionally, by

¹ *In re Kahn*, 78 USPQ2d 1329 (Fed. Cir. 2006).

assuming that Beer includes frangible puffed cereal pieces the Answer has completely ignored each and every free-flowing, non-frangible example listed in Beer, none of which have significant voids therebetween. Appellant again traverses such an assumption and maintains that Beer is clearly limited to free flowing, non-frangible food products which do not have significant voids therebetween, including free-flowing, non-frangible ready to eat cereal products which do not have significant voids therebetween. Appellant is not suggesting which free flowing, non-frangible ready to eat cereal products without significant voids therebetween Beer may have referring to, but again note that several such products do exist, including grits, granola, and so forth. While it is understood that a reference must be interpreted as broadly as possible, in this instance the Answer has impermissibly gone beyond any reasonable interpretation of the teachings of Beer.

Appellant also traverses the suggestion that since a frangible puffed cereal product is not specifically listed in Packaging Technology as a fragile item, it could not be considered the type of “fragile” product thought to be crushable under vacuum in Packaging Technology. Appellant maintains that an example of each and every product one might consider to be fragile is not necessary in order to fully appreciate the teachings of Packaging Technology.

Appellant again notes that the very definition of frangible is “a product that is capable of being broken.” (See page 14 of the Second Substitute Appeal Brief). Similarly, fragile refers to something that is, “easily broken or damaged or destroyed.” See, for example, *Merriam Webster’s Online Dictionary*, 10th edition. *Merriam Webster’s Online Dictionary* further lists “frangible” as a synonym of “fragile.”

As now admitted on page 24 of the Answer, Packaging Technology does indeed teach that fragile products could not be vacuum packaged without breaking. Therefore, it is clear that, as a fragile product, a frangible puffed cereal product was not considered to be a product capable of being vacuum packaged, since vacuum packaging was expected to break the products contained therein. The fact that Appellant’s invention shows otherwise is a surprising result.

2) The Rejections Lack a Rational Underpinning

The Appellant respectfully submits that the rejections under 35 U.S.C. §103 are based on hindsight which is not permissible according to *In re Kahn*:

“rejections on obviousness grounds cannot be sustained by mere conclusory statements; instead, there must be some articulated reasoning with some rational underpinning to support the legal conclusion of obviousness.”²

“mere identification in the prior art of each element is insufficient to defeat the patentability of the combined subject matter as a whole.”³

The Answer fails to show the rational underpinning required by *In re Kahn*, but only points to what are intended to be elements of the claimed invention variously in Beer and the other references, such as Thompson, and then pronounces this combination obvious for the following reason:

“Beer is silent in the particular type of free flowing ready to eat breakfast cereal such as a frangible puffed oat cereal that has a crust resistance no less than 7.0 PSIA, and that the vacuum sealing allows the package to be filled with approximately 20-60% more cereal. . . . it would have [been] obvious to modify the ready to eat, free-flowing cereal [of] Beer and include the free-flowing frangible puffed ready to eat cereal of Thompson et al. '990 because the free-flowing ready to eat cereal may be made into any desired form and stays crisp in milk for a prolonged period if time.”⁴

The Answer failed to find any specific support for this rationale in Beer or Thompson without misinterpreting the teachings of Beer. The Appellant respectfully submits that even if the rationale is not found in the applied references or other prior art, the Answer must show that the rationale has a rational underpinning. The statement in the Answer that the rationale is that “neither Beer nor any other evidence made of record would suggest that the “ready to eat breakfast cereal” disclosed by Beer is limited to any particular type of breakfast cereal, such as non-frangible cereals,” begs the question of what it is Beer does teach.⁵ Such a statement is conclusory in nature and fails to recognize that neither Beer nor any other evidence made of

² *In re Kahn* citing *In re Lee*, 61 USPQ2d 1430 (Fed. Cir.2002).

³ *In re Kahn*

⁴ Answer, page 18.

⁵ Answer, page 23

record would suggest that Beer teaches anything *other than* free-flowing, non-frangible food products, none of which have significant voids therebetween. Such a lack of a reasonable underpinning is impermissible according to *In re Kahn*.

The rejections are based on impermissible hindsight reasoning without a rational underpinning grounded in evidence.

The Appellant respectfully submits that a *prima facie* case of obviousness against claims 1, 4-17, 21, 22, 24, 27-29, 32-35, 37-39, 41-43, 45-57, 59-65 and 77-7 has not been established in the Answer, and that claims 1, 4-17, 21, 22, 24, 27-29, 32-35, 37-39, 41-43, 45-57, 59-65 and 77-79 are in condition for allowance.

CONCLUSION

The Appellant respectfully submits that the rejections of claims 1, 4-17, 21, 22, 24, 27-29, 32-35, 37-39, 41-43, 45-57, 59-65 and 77-79 under 35 U.S.C. §103 were erroneous. Reversal of these rejections is respectfully requested.

The Examiner is invited to telephone Appellant's attorney at (515) 233-3865 to facilitate the prosecution of this application. If necessary, please charge any additional fees or credit overpayment to Deposit Account No. 19-0743.

Respectfully submitted,
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Signature